IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SAROEUN NMI PHAI, Appellant.	)	No. 63327-9-I DIVISION ONE UNPUBLISHED OPINION FILED: August 23, 2010

Becker, J. — Saroeun Phai appeals his convictions and sentence for two counts of aggravated first degree murder in connection with the shooting deaths of a couple who worked at a marijuana grow operation in Everett. The jury found Phai guilty of two aggravating factors: (1) that he committed the murders in the course of, or in furtherance of, a robbery and (2) that there was more than one victim and the killings were either part of a "common scheme or plan or the result of a single act." Phai challenges the aggravators on jury instructions and sufficiency of the evidence grounds. We affirm because the jury needed to find only one aggravator to convict Phai of aggravated murder, and sufficient evidence supported the finding that the killings occurred during a robbery that went awry.

FACTS

In July 2007, Linda Nguyen and her fiancé, Kevin Meas, were living in a house on Dexter Avenue in Everett that Ngoc Nguyen had rented to grow marijuana.[1] Ngoc rented the house from Vo Van Tran, the owner. In exchange for living at the house, Linda and Kevin worked for Ngoc, tending to the marijuana she had growing in the basement. Ngoc also had a grow operation in another house on Beech Street and had Linda's brother, Hai Nguyen, and Hai's then girl friend, Natalie Nguyen, living and working there. Because of the family connection, the two couples visited frequently.

Areewa Saray somehow found out about the grow operation on Dexter Avenue, and he and Saroeun Phai allegedly decided to go to the house and steal money or marijuana. On the evening of July 2, 2007, as Saray and Phai entered the home, they encountered Linda and shot her. Saray reportedly looked for money inside the home but encountered Linda's boyfriend, Kevin, downstairs and both men shot him. At approximately 8:45 p.m., as they shot Kevin, the owner of the home arrived with his family. Owner Tran and his wife Thuy Pham hoped to confront Ngoc, thinking she lived there, to collect back rent. Tran claimed he was not involved in Ngoc's marijuana grow operation.

As the couple arrived, they saw a light colored Honda Accord parked near the front of the house. As they approached the house, Tran heard what sounded like a nail gun coming from inside. Standing at the front door, which

[1] Linda Nguyen and Ngoc Nguyen were not related. For clarity, we refer to individuals who share a last name or who have similar names by their first names only.

was partially opened, Tran noticed the body of a woman, later identified as Linda, lying on the floor motionless, and then saw two men with guns. The men ran toward Tran, and one stopped, pointed his weapon at Tran's head, and said, "'Go, go, go.'" Tran and his wife got in their car with their son and left. Tran saw the men speed past him in a car as they fled.

Tran called Ngoc explaining that something had happened at the house. After repeated calls from Ngoc, Hai drove to the Dexter house with his brother and Ngoc's husband. Hai found the door ajar, and his sister, Linda, face down on the floor, bleeding and unconscious. Everett Police Detective Phillip Erickson contacted Hai and his girl friend, Natalie, at the Everett Hospital where Linda lay dying. After Hai described finding her shot at the Dexter house, Erickson went there to investigate; other officers were already at the scene.

Everett police officers discovered Kevin's body at the bottom of the basement stairwell. They searched the house and found several bullets and bullet fragments, shell casings, and one unfired 9 mm round. The chief medical examiner for Snohomish County testified that Linda had been shot in the head twice. Kevin had been shot three times: twice in the head and once on his left shoulder.

Tran told Detective Erickson about the Honda Accord he had seen at the house on the night of the murders. In a separate investigation, Everett Police had responded to an arson call shortly before 10 p.m. on the night of the murders, less than two miles from the Dexter house. There they found a light

colored 1991 Honda Accord that had been completely burned. Neighbors testified that they called police after hearing the car ignite and seeing a dark colored compact car speed away. Erickson showed pictures of the Accord to Tran, who identified it from the back fender as the car he had seen at the Dexter house.

Records showed the car had been sold to Phal Chum of Tacoma months before the killings. Tacoma police knew of Chum, who had several convictions for theft crimes. Chum told police that Phai borrowed his car, but disavowed any involvement in the killings. At trial, Chum testified he was a longtime friend of Phai's since they had grown up together in the same neighborhood, and they shared an apartment during this period. He said he was also close friends with Saray. Chum claimed Phai asked for his help in a robbery, but he declined to participate, though he obtained a gun for Phai and lent him his car.

According to Chum, in June 2007 Saray, Phai, and Chum went to the Tacoma waterfront with their girl friends. While there, Phai allegedly asked Chum if he wanted to join Saray and him, and "get in on a lick." Chum testified he took that to mean Phai and Saray planned to commit a robbery. Phai reportedly explained he wanted Chum to act as a getaway driver when he and Saray robbed a house in Everett, where they expected to get money and marijuana. Chum agreed to join them.

Later that evening, Phai allegedly discussed the robbery in more detail. According to Chum, Phai said, "'Yeah, we're gonna go in there with guns. We're

gonna knock on the door, and as soon as we open the door, then we're going to start shooting.'" Chum testified that he tried to talk Phai into only tying up the home's occupants, but Phai refused, saying they were going to shoot whoever was there. The plan was to commit the crime sometime around the Fourth of July, so the sound of gun fire would be mistaken for fireworks. Chum testified that Phai asked him to help get a gun; Chum got a 9 mm handgun from his relatives. According to Chum, the gun did not initially work and had to be reassembled with parts from another gun. Chum said he gave the gun to Phai.

On July 2, the day of the killings, Phai reportedly woke Chum up to join in the robbery. Chum testified that he refused to go because he was troubled by the thought of shooting the occupants. Phai left, taking Chum's 1991 Honda Accord, which was found burned after the killings. Chum testified he saw Phai the next day. Phai allegedly told him about how the robbery transpired, explaining that Saray shot a woman when she answered the door, and he shot her too. According to Chum, Phai said both he and Saray went down to the basement and shot the man, with Phai firing first. Phai reportedly said someone knocked at the home's door, and both he and Saray ran. Afterward, they "torched" the Accord, Phai told Chum.

The jury also heard from Sopheap Phal, a longtime friend to Saray and Phai, and a cousin of Chum's. Sometime on the afternoon of July 2, Phai and Saray arrived at Sopheap's mother's house in Federal Way. Sopheap testified that Phai told him they were "going to do a lick," which he understood as slang

for a robbery. According to Sopheap, Phai said he hoped to get money and marijuana. Saray and Phai left sometime in the afternoon, but reportedly returned after midnight, looking scared. Sopheap testified that Phai gave him a bag of clothes and asked him to get rid of it. Saray and Phai allegedly discussed alibis: Phai would claim he had been at a casino with his girl friend; Saray was to say he had been at home.

According to Sopheap, Phai left and Saray asked to be driven to the waterfront, where he dropped a handgun into the water. Police later recovered a .38 caliber Rossi revolver, a 9 mm Glock semiautomatic, and a partially loaded Glock magazine near the pier. The Washington State Patrol Crime Lab compared the recovered weapons with bullets from the scene and the victims' bodies. Examiners found .38 caliber bullets in the bodies that they matched to the Rossi, but saltwater corrosion precluded matches to the 9 mm Glock. However, examiners were able to determine the Glock had been partially reconstructed with a barrel from a different gun.

After talking with Chum, Everett Police Detectives Erickson and John Zeka contacted Phai who reportedly agreed to an interview. Both detectives testified at a 3.5 hearing on February 13, 2009, that Phai's admissions were voluntary. According to Erickson, Phai conceded his involvement, saying he agreed to help Saray with the robbery because he was "'broke.'" He admitted to shooting the couple and called it "a big mistake." According to the detectives, Phai said Saray told him about a house in Everett where they could get between

$20,000 and $40,000 in cash. Phai said he and Saray went to the house, where a woman answered the door and Saray shot her in the head. Phai then shot her too. Saray and Phai went downstairs where they both shot a man. When people appeared at the door upstairs, Phai and Saray told them to leave and then fled. Phai said he had used a 9 mm Glock and Saray used either a .380 or a .38 revolver; he said they later torched the car they had driven.

The State charged Phai with two counts of aggravated first degree murder with a firearm and two counts of felony murder with a firearm. Saray was tried separately and is not part of this appeal. The State also charged Phai with two aggravating circumstances on the first degree murder counts: (1) that each killing was part of a "common scheme or plan, or the result of a single act" resulting in multiple victims, and (2) that the killings were committed "in the course of, in furtherance of, or in immediate flight from Robbery in the First or Second degree." A seven day jury trial was held in March 2009 before the Honorable Larry E. McKeeman in Snohomish County Superior Court. The jury found Phai guilty of the four charged offenses and, by special verdict, also found the firearm enhancements and the two aggravating circumstances. At sentencing on April 10, 2009, the State requested that the felony murder charges be dismissed. The court did so and sentenced Phai to life without the possibility of parole, based on the aggravating circumstances. Phai appeals.

ROBBERY AGGRAVATOR

Phai argues the State failed to prove beyond a reasonable doubt that he

committed a robbery, so this aggravating circumstance must be stricken. To obtain a mandatory sentence of life without parole, the State needed the jury to find Phai guilty of only one aggravating circumstance. RCW 10.95.030(1); RCW 10.95.020. Without a jury finding on one of the aggravators, Phai would have been guilty only of first degree murder, punishable by a life sentence but with the possibility of parole. RCW 9A.20.021(1)(a); RCW 9A.32.030(2). Thus, this first issue is potentially dispositive of Phai's appeal of his sentence of life without parole.

Phai was charged with two aggravating circumstances:

> (10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;
> (11) The murder was committed in the course of, in furtherance of, or in immediate flight from [a robbery in the second degree.]

RCW 10.95.020(10), (11)(a) (emphasis added). The trial court instructed the jury that it must unanimously find the aggravating circumstances personally applied to Phai:

> If you find the defendant guilty of premeditated Murder in the First Degree as charged in Count I, you must then determine whether any of the following aggravating circumstances exists:
> There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person, or
> The murder was committed in the course of, in furtherance of, or in immediate flight from Robbery in the Second Degree.
> The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.
> You should consider each of the aggravating circumstances

> above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance.
>
> For any of the aggravating circumstances to apply, the defendant must have been a major participant in acts causing the death of Linda Nguyen,[2] and the aggravating factors must specifically apply to the defendant's actions. The State has the burden of proving this beyond a reasonable doubt. If you have a reasonable doubt whether the defendant was a major participant, you should answer the special verdict, "no."

Jurors found the robbery and common scheme/single act aggravators unanimously, by two separate questions on a special verdict form.

A finding of only one aggravating circumstance mandated a sentence of life in prison without parole:

> A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exists.

RCW 10.95.020 (emphasis added); see also State v. Kincaid, 103 Wn.2d 304, 310, 692 P.2d 823 (1985) (noting that a defendant convicted of premeditated first degree murder and one or more aggravating factors is sentenced to mandatory life imprisonment, where the death penalty is not sought).

Phai argues the evidence was insufficient to show he killed Linda and Kevin "in the course of, in furtherance of, or in immediate flight from" second degree robbery. In a sufficiency inquiry, we review the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v.

[2] Instruction 25. Instruction 26 was identical except that it referred to Count III and the other victim, Kevin Meas.

Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003). We defer to the trier of fact on issues of credibility and persuasiveness of the evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

> A person commits robbery in the second degree if she
>
> unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.

RCW 9A.56.190; RCW 9A.56.210.

Phai contends that since the evidence did not show he took any property during or immediately after the shootings, a fundamental requirement of the aggravating circumstance was not proven. However, Phai's argument ignores the fact that the jury could find he committed the murders "in the course of," or "in furtherance of," a robbery in the second degree, not just in the course of, or in flight from, a completed robbery. RCW 10.95.020(11).

In State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996), the Washington Supreme Court considered, and rejected, the same claim. "The State asserts a premeditated murder committed in the course of or in furtherance of a robbery, even when the robbery is not completed, is sufficient to find the existence of an aggravating circumstance. We agree." Brett, 126 Wn.2d at 162. The court explained why the defendant's argument failed: "Brett's interpretation is not reasonable because it would render superfluous the 'in the course of, in furtherance of' language in the statute."

Brett, 126 Wn.2d at 165, citing State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). Although the robbery in Brett went awry and was not completed, the court held there was sufficient evidence that the murder was committed in the course of a robbery for the jury to consider the aggravator. Brett, 126 Wn.2d at 165-66.

Phai notes that Brett also states, "'Premeditated murders committed during the course of an attempted robbery are not' within the scope of the aggravated murder statute, RCW 10.95.020." Reply Br. at 2, quoting Brett, 126 Wn.2d at 163. In Brett, the defendants planned to tie up a rich elderly couple at night, and when the banks opened the next day, withdraw their money and then kill them afterward. Brett, 126 Wn.2d at 148. When they tried to restrain the couple, both resisted, and someone activated the alarm. Brett shot and killed the husband, and the wife fled. Like the case at hand, both defendants fled the scene without taking anything from the residence. Brett, 126 Wn.2d at 149.

According to Phai, "If the distinction between 'attempted' robbery and the 'course of robbery' has meaning as held in Brett, then a person may not be planning on engaging in a robbery but must actually be in the process of committing the robbery." He argues that in Brett the defendants' elaborate plan for the robbery was in motion when that murder occurred, but the same is not true in his case.

But there was sufficient evidence for jurors to conclude that Phai's plan—to kill the occupants of the home and then steal money or marijuana—was also in motion, though the robbery was not completed here either because the home owner arrived. Phai himself told police he went to the house because, "'I was broke,'" and two friends testified that he planned to commit a robbery. Chum testified that Phai planned to rob the house and kill its occupants and could not be talked into simply restraining whoever was inside during the

robbery. According to Chum, Phai said, "'We're gonna go in there with guns. We're gonna knock on the door, and as soon as we open the door, then we're going to start shooting.'" Phai's other friend, Sopheap, who helped dispose of the clothing and guns used in the robbery, also offered damning testimony regarding the robbery aggravator. He testified that Phai admitted he and Saray were on their way to commit a robbery and hoped to score some money and marijuana.

Phai told police, in an interview the trial court found was voluntary, that he shot the victims during a robbery because Saray had told him they would find tens of thousands of dollars at the house. He now claims that since he and Saray searched for money in between shooting Linda and Kevin, and then fled when Tran and his wife arrived, the killings were committed during an attempted robbery. "No one claimed they took anything with them from the house or that they were holding anything other than guns."

Phai asserts that unlike felony murder, which the State can prove if the defendant committed or attempted to commit a robbery, aggravated first degree murder requires a completed robbery to mandate a sentence of life without parole. But again, this ignores the specific language of the aggravating circumstances statute—"in furtherance of" a robbery is enough—and the holding of Brett, neither of which require a completed robbery. In Brett, the Supreme Court expressly rejected the same argument based on the "attempt" language of the felony murder statute. Brett, 126 Wn.2d at 162. In doing so, the court

quoted with approval from an Illinois case:

> "A murder may be committed 'in the course of' an armed robbery whether or not the actual armed robbery is consummated.
>
> An essential element of an attempt is that the accused perform 'any act which constitutes a substantial step toward the commission of that offense.' It is a question of fact whether '[an] act which constitutes a substantial step toward the commission of' armed robbery constitutes 'in the course of' an armed robbery, so that the act becomes an aggravating factor authorizing imposition of the death penalty. We again emphasize that the death penalty statute specifies as an aggravating factor that the murder be committed 'in the course of' one of the listed felonies. The statute does not require that the other felony be completed or that the defendant be charged with or convicted of the other felony or an attempted felony."

Brett, 126 Wn.2d at 163-64, quoting People v. Walker, 91 Ill. 2d 502, 510-11, 440 N.E.2d 83 (1982) (alteration in original). Moreover, Phai does not offer any case law that contradicts Brett's holding.

Viewing the testimony of Phai and the two friends who assisted him in the light most favorable to the State, a rational trier of fact could conclude Phai killed Linda and Kevin during a robbery which went awry and was not completed.

With respect to the other aggravating factor submitted to the jury, Phai argues the trial court erred by not instructing the jury that all 12 must agree on either "a common scheme or plan," or "a single act" causing multiple deaths, or both, and that in fact there was insufficient evidence of either. He further contends the trial court erred by failing to define "common scheme or plan" and "single act" for the jury. We need not reach these claims because sufficient evidence supported the robbery aggravator, and the jury needed to find only one aggravating circumstance to sustain the conviction for aggravated first degree

murder. Thus, we affirm Phai's sentence of life without the possibility of parole.

JUDGMENT AND SENTENCE

The State properly acknowledged that Phai's convictions for first degree felony murder were the same in fact and in law as his convictions for aggravated first degree murder. The judgment listed the jury's verdict on the four charged counts in the "FINDINGS" section. But the judgment unequivocally dismissed the two counts of felony murder with a firearm: "The Court DISMISSES Counts II + IV." The "SENTENCE AND ORDER" section also shows the court sentenced Phai only on counts I and III, the two counts for aggravated first degree murder with a firearm.

Phai nevertheless asserts a double jeopardy violation. Courts may not enter multiple convictions for the same offense without offending double jeopardy. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005). A conviction reduced to judgment, even if not sentenced, violates double jeopardy. State v. Womac, 160 Wn.2d 643, 647, 160 P.3d 40 (2007).

In Womac, the trial court entered judgment on three convictions that constituted the same criminal conduct, but sentenced Womac only on one count. Womac, 160 Wn.2d at 648. "That Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions." Womac, 160 Wn.2d at 656. The court explained that Womac's convictions could contribute to his offender score, impact parole eligibility, be used to impeach his credibility, and contribute to "'the societal stigma accompanying any criminal conviction.'" Womac, 160 Wn.2d at 657, quoting Ball v. United States, 470 U.S.

856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985).

In contrast, where a jury makes multiple findings of guilt for the same conduct, but the court enters judgment on only one of the convictions, there is no double jeopardy problem and the judgment is sound. The Womac court discussed two such cases. In State v. Ward, 125 Wn. App. 138, 104 P.3d 61 (2005), a jury convicted Ward of both second degree felony murder and the predicate felony of second degree assault, but judgment was entered only on the felony murder, so vacation was not necessary. Womac, 160 Wn.2d at 658-59, citing Ward, 125 Wn. App. at 144.

Similarly, in State v. Trujillo, 112 Wn. App. 390, 49 P.3d 935 (2002), review denied, 149 Wn.2d 1002 (2003), the defendants were convicted of the alternative charges of attempted murder and first degree assault, but no vacation was necessary because the trial court did not enter judgment on the assault conviction. Womac, 160 Wn.2d at 659-60, citing Trujillo, 112 Wn. App. at 411-12.

Phai points to the "Order of Commitment" which includes the jury's verdict on all four counts. But this order is not the key document; the judgment is, as per Womac. As the State correctly points out, the commitment order does not enter the judgments, and entering the judgment is the act that would violate double jeopardy. Moreover, the order itself is correct because it incorporates by reference the court's dismissal of the lesser counts and the prison term provided in the judgment and sentence.

We conclude the trial court did not err in its entry of Phai's judgment and sentence, and thus, there is no need to remand or to resentence.

Affirmed.

WE CONCUR: